JDRN
International
Judicial Dispute
Resolution Network

PRACTICE GUIDE ON MEDIATION

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Table of Contents

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A. PURPOSE OF THE GUIDE

1. The purpose of this Practice Guide is to provide a set of guidelines on the objectives, process and practice in the use of mediation as part of the Judicial Dispute Resolution (JDR) process.

2. These guidelines should be implemented and adapted in each jurisdiction as appropriate in furtherance of the aims of mediation to promote the overarching objective of early, amicable, cost-effective and fair resolution of court disputes in full or in part so that judicial time is saved.

3. These guidelines are not intended to be exhaustive. The legal framework and court procedures of each jurisdiction are to be considered when applying these guidelines.

B. WHAT IS MEDIATION?

4. Mediation is one of the Court Alternative Dispute Resolution (ADR) modalities employed during the JDR process as a key case management tool. Mediation in a case brought before the court can be conducted either by a judge or by a third party such as a court-annexed mediator or a mediation service provider on the direction or referral by the court. Mediation is a flexible, non-binding dispute resolution procedure in which a neutral third party, the mediator, facilitates discussions and negotiations between the parties and guides them towards a mutually acceptable settlement.

5. Mediation may be conducted by a judge, a judicial officer or a third-party mediator. For example:

   (i) In the Federal Court of Australia, the majority of court-ordered mediations are conducted by Judicial Registrars who are trained and accredited under the Federal Court Mediator Accreditation Scheme.

   (ii) In China, mediation can be carried out by a judge or a judge's assistant, or, with the consent of the parties, delegated to a mediation organisation or a mediator. Mediators include lawyers, experts and scholars, and retired legal workers.

   (iii) In Germany, judges also conduct mediations (such judges are referred to as judge-mediators).

   (iv) In Malaysia, court-annexed mediation is conducted by the High Court judges and judicial officers who have been certified as mediators at the

High Courts and the Subordinate Courts (Sessions and Magistrate Courts) either by way of reference by judges/ court officers or by request from the parties and by automatic reference (for motor accident cases claims only).

(v) In the Philippines, the court may make an order referring parties to the Philippine Mediation Centre for mediation by accredited mediators.

(vi) In Singapore, cases in the High Court are proactively referred for mediation at the Singapore Mediation Centre and other mediation service providers selected by parties. Cases in the District Court and the Magistrate's Court are directed or referred to for mediation by either judges who are specially trained as judicial mediators, or court-volunteer mediators (who are usually practising lawyers).

(vii) In the Southern District of New York's Court-annexed mediation program, mediations are conducted by a staff mediator and a roster of volunteer mediators who have applied to serve the Court in this capacity. All mediators are practicing lawyers and members of the bar of any Federal District Court.

(viii) In England and Wales, the Government confirmed plans in 2023 to integrate mediation as an essential part of the court process for lower value civil claims. Claims will be referred automatically to the free-of-charge Small Claims Mediation Service. The Government also intends to integrate mediation for higher value claims. This is enabled by the judgment handed down by the Master of the Rolls in *Churchill v Merthyr Tydfil* [2023] EWCA Civ 1416, which proved the ability for a judge to order parties to engage in a non-court-based dispute resolution process.

6. There are two main models of mediation.

(i) Facilitative mediation

7. It is an interest-based approach that focuses on the parties' underlying needs and interests. Facilitative mediation places emphasis on party autonomy and self-determination. It allows the mediator to clarify and enhance communication between the parties so that they can better explore options for resolution. Unlike evaluative mediation, the judge mediator facilitates, rather than directs, the parties towards a resolution of the dispute, often by asking questions to help parties identify their interests, and understand better their legal positions and the legal positions of the other side.

(ii) Evaluative mediation

8. The mediator takes on a more directive approach and provides guidance and advice to the parties towards reaching a settlement. A settlement that is reached

through the evaluative approach takes into account the parties' legal rights and obligations, as well as the strengths and weaknesses of their case theory and factual evidence.

9. Often, mediation blends these two models, and the mediator may utilise different approaches, depending on the stage of the mediation, the dynamics between parties and the facts of the case. A more evaluative approach may be needed to encourage parties if they have otherwise exhausted negotiations based on a facilitative approach. A judicial mediator may also choose to rely on his or her judicial expertise and experience to apply a more evaluative approach, in order to more actively steer parties towards a settlement.

10. Whichever approach is taken, the mediator needs to be attuned to the nature of the dispute, the parties and their specific needs, and be prepared to guide the parties in appreciating the constraints of their situation and the practical outcomes that can be pursued.

C. KEY FEATURES OF THE MEDIATION PROCESS

11. Although mediation is a flexible, more informal process, it is suggested that, as a matter of best practice, the mediation process should consist of the following features: (i) a pre-mediation session with lawyers (where parties are legally represented); (ii) joint sessions; and (iii) private sessions. The characteristics of each feature are elaborated on below. Mediation can take place whether or not parties are legally represented.

(i) Pre-mediation session

12. This is a meeting convened by the mediator with parties' lawyers before the commencement of the mediation session. It serves as a constructive initiation platform for information gathering and exchange. The pre-mediation session is an intake process during which the mediator gathers basic information about the dispute and the parties' respective cases from the lawyers, assesses the parameters of the dispute, understands the underlying dynamics between the parties, identifies the specific issues to be addressed at the mediation, and prepares by reviewing the documents to ensure that the mediation session runs smoothly. The lawyers for each party may assist the mediator during this process by identifying (i) the party's contentions as to both liability and damages; (ii) an assessment of strengths and weaknesses of each party's claims and/or defenses; (iii) the status of any settlement negotiations, including prior demands and offers; (iv) barriers to settlement, if any; (v) the parties' reasonable settlement range, including any non-monetary proposals for settlement of the action; and (vi) any other facts or circumstances that may be material to the mediation or settlement possibilities (for example, whether disclosure of further documents may assist a settlement). It may be useful for the mediator to emphasise to parties

that they must be interested in resolving the case. There is no value in conducting a mediation using judicial resources unless the parties have confirmed that they are open to a negotiated resolution. The pre-mediation session also enables parties to discuss and agree on administrative and logistical matters such as the date and time of the mediation, whether it should be conducted in person or virtually.

13. The pre-mediation session is useful in mediations involving complex and high-value claims. It may not be necessary in simpler and smaller-value claims, or where parties are not legally represented. It should be held before the date of the mediation session proper to allow parties to prepare the information and follow up on the matters discussed at the pre-mediation session in order to optimise the time spent and effectiveness of the mediation session.

(ii) Opening joint session

(a) Setting the right tone and rules of engagement

14. The mediation session usually commences with a joint session involving the mediator, the parties and their lawyers. At the outset of the joint session, the mediator sets a positive tone for the mediation with an effective opening statement that resonates with the parties. The mediator, as a process manager, should explain the nature and objectives of mediation to the parties, namely, the need to define the issues, to seek common ground and to engage in collaborative problem-solving. The mediator also provides an overview of the order of the proceedings during the mediation session. The mediator also clarifies the role of the mediator and the parties. In particular, the mediator emphasises his or her role as an impartial, neutral third party in facilitating the process of problem-solving, as opposed to that of adjudicating and decision-making.

15. The mediator next reminds parties to be mindful of the rules of engagement during the mediation session (e.g. of not interrupting when one party is speaking and of parties maintaining civility towards each other). The requirements of confidentiality and discussions being on a "without prejudice" basis (i.e. such communications cannot be utilised or relied upon by parties in the court proceedings) that generally apply to the mediation process are reiterated.

(b) Case presentation by parties

16. After the mediator establishes the rules of engagement and the grounds rules, parties will take turns to present their perspective, including what they seek to achieve through the mediation and their interests and positions. This exercise is instrumental in enabling each party to have a mutual and deeper understanding of the views and interests of the other party. It is also useful for parties to have the opportunity to express their views on the dispute first-hand to the other party. Whilst there will be some discussion of the merits, a detailed examination

of the merits is not encouraged. Parties should focus on trying to resolve the matter rather than trying to convince the mediator that they have the stronger case and will succeed at trial.

(c) Agenda setting

17. During the first joint session, the mediator helps parties identify their underlying interests by asking questions, and summarising and reframing what they had shared. With the information gathered, the mediator proceeds to identify and define the parameters, namely, the common areas of agreement between the parties and the issues that are in dispute. An order of the issues to be prioritised, discussed and explored is set out in a neutral and impartial manner by the mediator. This agenda serves as a focal point for the parties to work towards settlement.

(d) Proactive facilitation

18. At the next stage of problem-solving, the mediator draws the parties into constructive negotiation by encouraging them to communicate directly with each other and develop and explore a range of options towards reaching a mutually acceptable solution. The mediator facilitates the generation of options by asking open-ended questions and intervening strategically to enhance the negotiation process. At the same time, the mediator impresses upon the parties to consider the viability and practicality of the options generated in meeting their interests and needs. This is pertinent in setting the stage for reality-testing in private sessions.

(iii) Private session

19. A limitation of the joint session is that parties are often reluctant to openly share their concerns and other confidential matters, as well as be candid about the strengths and weaknesses of their cases. This constraint is removed during the private session, where the mediator meets each party separately.

20. At this stage, the mediator plays a critical role in calibrating the expectations of the parties with reality testing and risk analysis exercises. These tools are typically applied by the mediator in private sessions where the parties are more candid. They are particularly useful when unrealistic expectations of the parties are stumbling blocks to a negotiated settlement. During the private session, the mediator may objectively discuss and evaluate the legal arguments put forth by each party and guide them through the legal process and potential legal ramifications.

21. The private session also allows each party to be more candid with the mediator, without fear of compromising his or her bargaining position. Parties and their lawyers may find it helpful to discuss with the mediator on the optimal manner

to convey their proposals to the other party. Where settlement offers are made during these private sessions, the mediator should not communicate them to the other side unless authorised to do so.

(iv) Subsequent joint sessions

22. After the private sessions, parties reconvene in a further joint session where their respective proposals are discussed at length. Parties are encouraged to bridge the differences between them by way of a middle ground, set-offs, or any other viable method, in order to achieve an outcome that can be mutually agreed to. This is an iterative process which can involve multiple rounds of private and joint sessions.

23. At the final resolution stage, the mediator is involved in clarifying the proposed terms and examining the consequences for non-compliance of the settlement agreement. Where the parties have reached an agreement, the mediator must be satisfied that all the issues in dispute have been addressed before the terms of settlement are finalised and the parties are clear on what they have agreed to before signing.

24. Where there is an impasse in the negotiations, the mediator may, with the consent of the parties, propose options to assist parties in bridging the gap. The mediator may also suggest or facilitate a resolution of part of the dispute.

25. Even if no firm settlement is achieved at the close of the session, the mediation should not be viewed as a futile exercise. The mediation would have helped the parties to achieve a better understanding of each other's perspective and narrow the issues in the dispute. With a more realistic assessment of the risks involved in escalating the dispute to a formal adjudicatory forum, the parties usually become less fixed on maintaining their strict legal positions and are more open to revisiting the options to settle and reopening the negotiations, after the conclusion of the mediation.

D. BENEFITS OF MEDIATION

26. The benefits of mediation include:

(i) **Saving of time**, as a mediated settlement will take much less time than a trial.

(ii) **Saving of cost and resources**, as the cost and resources required to prepare and conduct a trial (and any possible appeals) are substantial.

(iii) **Flexibility and creativity of solutions**, as parties can tailor a practical settlement based on their underlying interests, needs and constraints, and

not be entirely constrained by their legal positions, evidential burden and available remedies under the law.

(iv) **Certainty and control over the outcome by parties**, in contrast to the uncertainties of the trial process (and any possible appeals) and an adjudicated outcome imposed on parties.

(v) **Confidentiality**, as it is common for parties to stipulate that the settlement is confidential. If no settlement is reached, all discussions and negotiations conducted at the mediation are confidential and "without prejudice", and therefore cannot relied upon by any parties in the proceedings. The trial judge is and should not informed of what transpired during the mediation process.

(vi) **Acceptance of the outcome of the mediation process**, since parties have decided and agreed on the outcome of their dispute and therefore are more likely to be satisfied with the result and comply with what has been agreed.

(vii) **Preservation of relationships**. Where parties are required to continue working or interacting with each other even after the dispute has arisen (e.g. parties may be family members or commercial partners in a long-term relationship), a mediated outcome (being an outcome which both parties have agreed to) is more likely to preserve the ongoing relationship than a trial.

E. SUITABILITY OF MEDIATION IN THE AMICABLE RESOLUTION OF COURT DISPUTES

27. Mediation is an effective Court ADR modality to facilitate the amicable resolution of disputes in a wide range of matters, including high-value commercial claims, small-value contractual claims, personal injury claims, employment claims and familial and other relational disputes.

28. That said, there may be instances where a mediated outcome may not be in the public interest, e.g. there may be disputes over matters involving public rights or the judicial review of administrative decisions of a public agency which may impact a class or cross-section of the public and in respect of which certainty in respect of the correctness or validity of the executive decision would be desirable.

F. CRITICAL SUCCESS FACTORS IN THE IMPLEMENTATION OF MEDIATION WITHIN THE JUDICIARY

29. In order for mediation to succeed, it is important to have in place a proper legal framework, operational policies and processes, the necessary resources, adequate stakeholder engagement and support, and public education and outreach.

30. Mediation should be supported by the legal framework. The necessary legal framework can take the form of primary legislation (e.g. statutes passed by parliament or congress) or secondary legislation (e.g. the court's procedural rules, practice directions or any other legally binding guidelines issues by the court). In some jurisdictions, mediation is mandatory. In others, although mediation is not mandatory, it is actively encouraged – for example, mediation services are made available for free or at a low cost, the provision of cost consequences if parties fail to engage in mediation without good reason.

31. In China, mediation must be voluntarily taken by the parties. The Civil Procedure Law of the People's Republic of China provides that the people's courts shall, on the basis of the principle of the voluntariness of the parties, distinguish between right and wrong and engage in mediation according to the clear facts when hearing civil cases. However, all courts will encourage and guide the parties to engage in mediation. Judicial interpretations and judicial policy documents issued by China's Supreme People's Court all provide that where the people's court considers a dispute to be suitable for mediation prior to the acceptance of a case or in the course of litigation, it may explain the advantages of mediation and guide the parties to give preference to mediation as a means of resolving disputes. The litigation service centers of local courts in China all provide guidelines on mediation.

32. Additionally, in China, through the "one-stop" platform for diversified resolution of international commercial disputes, the China International Commercial Court supports parties to resolve disputes through mediation and encourages online mediation. The China International Commercial Court may entrust the international commercial expert committee or international commercial mediation institution within the "one-stop" platform to preside over the mediation, and if the parties reach a mediation agreement, the China International Commercial Court may issue a mediation document in accordance with the provisions of the law, and the mediation document shall have the same legal effect as the judgment. If the parties apply for the court to make a judgment, the China International Commercial Court may issue a judgment in accordance with the content of the mediation agreement.

33. In Malaysia, court annexed mediation is voluntary except for motor accident cases which require mandatory reference to mediation, as provided for in Order 34 Rule 1(1B) of the Rules of Court 2012. Judges may refer parties to mediation. In supporting mediation, the Malaysian Judiciary issues Practice Directions from time to time and the only authoritative guide applicable now is the Practice Direction No. 2 of 2022 - "Matters and Mediation Procedures for Cases in the

High Courts and the Subordinate Courts" ("PD 2/2022") that came into force on 1 April 2022.

34. In the Southern District of New York, mediation is mandatory in certain types of cases such as employment discrimination, and certain other civil rights matters, pursuant to local rule or standing order. All other civil matters can be referred to mediation by the presiding judge with or without a request from the parties.

35. In Singapore, Order 5 of the Rules of Court 2021 provides that parties have a duty to consider the amicable resolution of disputes. The State Courts Practice Directions 2021 encourages and provides for the use of court alternative dispute resolution modalities, such as mediation and neutral evaluation. There are also legislative provisions which specifically provide for judicial immunity where the judge is presiding over the JDR process.

36. In England and Wales, Part 1 of the Civil Procedure Rules provides that the court 'must further the overriding objective by actively managing cases' which includes 'encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate'. In 2023 the Government announced plans to amend the Civil Procedure Rules so that defended small claims (up to £10,000) are referred for mediation before the claim can progress to a hearing. The judgment handed down by the Master of the Rolls in *Churchill v Merthyr Tydfil* [2023] EWCA Civ 1416 in 2023 further proved the ability for a judge to order parties to engage in a non-court-based dispute resolution process.

37. The mediation policy and process being implemented should be clear and easy to understand. Some of the matters that need to be decided in putting in place a mediation policy would include whether mediation should be mandatory or voluntary, whether mediation is to be conducted by judges or outsourced to court-annexed mediators or external mediation service providers, and the point in the proceedings at which mediation is most appropriate. The process should be as simple as possible, taking into account the needs and resources of the jurisdiction.

38. It is important to have the necessary judicial and administrative resources to support mediation. Judges, judicial officers or third-party mediators who conduct mediations should have sufficient training in mediation in order to gain the trust and confidence of parties and their lawyers in the usefulness of the mediation process in achieving fair and sound negotiated outcomes.

39. There should be active stakeholder engagement and support. Litigants and their lawyers need to be well-informed and familiar with the mediation process, and the benefits of participating in mediation. Courts should invite feedback and suggestions from litigants and their lawyers and incorporate suitable suggestions to improve and enhance the mediation process.

40. Public education and outreach is key to implementing a successful mediation policy in the judiciary. If the public recognises that mediation is a primary and effective mode of managing and resolving court disputes, this will in turn result in greater acceptance and confidence in its application and effectiveness. Information about mediation should therefore be readily accessible and available to the public. Collaborating with other organisations and government bodies who regularly encounter court users or litigants to raise awareness of mediation is also encouraged.

G. USE OF TECHNOLOGY IN MEDIATION

41. The COVID-19 pandemic has brought about the increased use of technological platforms to conduct mediation. It is now common for mediation to be conducted *via* video-conferencing. The option of conducting mediation remotely is useful where the parties do not reside in the same city or state or where the decision-makers for each party are located in multiple jurisdictions. In this regard, the mediator should always take into account the dynamics of the relationship between parties and the nature of the dispute when determining whether conducting the mediation remotely or in person will better facilitate an amicable, negotiated outcome for parties.

42. In the Ontario Superior Court of Justice, most lengthy mediations are conducted in person. However, if there are issues with parties attending in person, the mediation can proceed remotely, over Zoom. Alternatively, the mediation can be conducted in person without the physical presence of all parties but parties who are not physically present must make themselves available at all times during the mediation to give instructions.

43. In China, mediation can be conducted in person or through online video (People's Court Mediation Platform). The Supreme People's Court of China has issued the Rules for Online Mediation by the People's Courts, which provide detailed provisions on online mediation. Chinese courts must first obtain the consent of the parties involved in the use of online mediation, and at the same time take into account the specific circumstances of the case, technical conditions and other factors. For parties that do not have the equipment required for remote mediation, Chinese courts provide them with a place for remote mediation and audio-visual equipment at the court litigation service center, the seat of the mediation organization, or other convenient places. Currently, nearly 50% of the disputes mediated by Chinese courts prior to case acceptance are conducted by video.

44. In Malaysia, mediation cases are conducted in person or remotely (via the Zoom application). The parties are required to inform the Registry whether they want the mediation session to be conducted in person or remotely. The Malaysian

Judiciary looks at the following factors in determining whether remote mediation is to be utilised:

(i) the understanding of the parties on the mediation process that will be conducted via video conferencing;

(ii) the ability of the parties to attend the mediation process by video conferencing; and

(iii) the availability and quality of technology that will be used considering the hardware, software and internet access speed that needs to be provided.

45. In Singapore, leveraging on technology to improve access to justice, mediations are, by default, conducted remotely over Zoom. The mediator however has the discretion to direct that the mediation take place in person. Parties may also write in to request that the mediation take place in person. If such requests are made jointly, they would normally be acceded to.